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# Minimum Competency Testing - Redundancy or Necessity? An Analysis of the Educational and Legal issues

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# MINIMUM COMPETENCY TESTING—REDUNDANCY OR NECESSITY? AN ANALYSIS OF THE EDUCATIONAL AND LEGAL ISSUES

THE TAXPAYER revolt which characterized the 1970s has finally hit the schools. Taxpayer outrage over paying for what has been perceived as grossly inadequate education has culminated in a demand for public education that does what it is supposed to do: provide the students with an education. At a minimum, taxpayers and parents are demanding that students graduate from high school with the ability to read, write, and do simple arithmetic. Taxpayers and private donors are understandably upset when their contributions to higher education are spent teaching college students to read and write.<sup>1</sup> In addition, there is an "increasing scarcity of jobs which do not require proficiency in reading, writing, and arithmetic."<sup>2</sup> For example, "manuals for Army cooks require an eighth- or ninth-grade reading level, and instructional manuals for mechanics in the Navy and Air Force require at least an eleventh- or twelfth-grade level . . . ."<sup>3</sup>

Many high school graduates would not qualify for these jobs. One author asked some high school teachers and principals what level of school work they could *guarantee* that 97% of all graduates could do. They answered, "Well, first grade work; maybe second grade."<sup>4</sup> This low level of capability after twelve years of public education causes citizens to complain about students being passed from grade to grade (social promotion) and eventually graduating just for putting in "seat time."<sup>5</sup> The Department of Health, Education, and Welfare has "concluded that an estimated one million American youths, twelve to seventeen years old, probably could not read as well as the average fourth grader, and thus they could be called illiterate."<sup>6</sup>

<sup>1</sup> Hechinger, *The Back-To-the-Basics Impact*, TODAY'S EDUCATION 31 (Feb.-Mar. 1978).

<sup>2</sup> *Id.*

<sup>3</sup> Chall, *Minimum Competency in Reading: An Informal Survey of the States*, 60 PHI DELTA KAPPAN 351, 352 (Jan. 1979).

<sup>4</sup> Brickell, *Seven Key Notes on Minimum Competency Testing*, 59 PHI DELTA KAPPAN 589, 591 (May 1978).

<sup>5</sup> One teacher reports:

[i]n my first year of teaching I used a standard textbook to teach a senior geography class. About one-fifth of my students did not know how to read. They could not handle the work; therefore, I could not in good conscience give them a passing grade. Yet these students were high school seniors, and I did not want to be responsible single-handedly for preventing them from graduating. I asked some senior faculty members what I should do. They explained that if a student came to class and was not disruptive, he or she was to receive a passing grade.

Hart, *The California Pupil Proficiency Law As Viewed by Its Author*, 59 PHI DELTA KAPPAN 592 (May 1978).

<sup>6</sup> U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, LITERACY AMONG YOUTHS 12-17 YEARS 3 (1973), cited in McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 653 (1979).

The legislative response to these and similar findings has been swift, complex, and overwhelming in its variety. The most common response has been to enact competency testing statutes, euphemistically entitled educational accountability or assessment acts, or mastery learning programs. Four years ago these tests were unheard of; now, according to some commentators, every state has adopted or discussed some sort of minimum competency program.<sup>7</sup> Estimates of the number of state statutes and resolutions vary with each article that has been written about them. Undoubtedly by the time this commentary is read for the first time, some of the legislation it contains and refers to will be out of date. "The push for minimum competency testing... [i]n 1976 and 1977... could only be described as 'fast moving.' Sweeping concepts were included in one-page bills; state board mandates were often short paragraphs asking local districts... to 'implement a full-scale program' sometimes very quickly."<sup>8</sup> Public reaction (except perhaps that of failing students and their parents) has overwhelmingly favored competency testing plans. Sixty-five percent of those surveyed in a 1976 Gallup Poll answered "yes" when asked whether "all high school students... [should] be required to pass a standard nationwide examination in order to get a high school diploma."<sup>9</sup> "The minimum competency testing movement is clearly being led, or pushed, by noneducators."<sup>10</sup>

This article will discuss the pros and cons of the movement, first from an educational viewpoint, then from a legal perspective, touching on some current state plans and programs and offering suggestions and conclusions.<sup>11</sup>

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The widely publicized Adult Performance Level (APL) Study... found that on overall competency performance, ... 19.7% of the population could be classified as 'functionally incompetent' or 'adults who function with difficulty.' 33.9% could be classified as 'functional adults,' and 46.3% could be classified as 'proficient adults.' ... 'Overall, approximately one-fifth of U.S. adults are functioning with difficulty.'

UNIVERSITY OF TEXAS AT AUSTIN, ADULT FUNCTIONAL COMPETENCY: A SUMMARY (1975), cited in McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 654 (1979).

<sup>7</sup> Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN, 585 (May 1978); Pipho, *Minimum Competency Standards, Today's Education*, 34, 35 (Feb.-Mar. 1978). See Appendix A comparing state minimum competency testing statutes.

<sup>8</sup> Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585 (May 1978).

<sup>9</sup> Hart, *supra* note 5, at 592.

<sup>10</sup> Pipho, *supra* note 8, at 586.

<sup>11</sup> In order to narrow somewhat the scope of this comment, the issues unique to competency testing of handicapped students have been omitted. See generally, McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM, L. REV. 651, 698, 701 (1979). Likewise, issues relating to testing teacher competency have not been discussed. See generally, Pipho, *supra* note 8, at 587.

In addition, the reader may be interested in a development so recent it was not included herein. A case very similar to *Debra P. v. Turlington*, 474 F. Supp. 244 (1979) was filed in North Carolina in May of 1980. *Iwanda H. v. Berry*, No. CC 80-0156 (W.D.N.C., Charlotte Div., complaint and motion for preliminary injunction filed 5/2/80). A short

# THE EDUCATORS' VIEWPOINT

First of all, what is a minimum competency test? It is "a standardized examination designed to demonstrate whether a student has reached a given level of proficiency in any one of several basic academic skills required to function in everyday adult life."<sup>12</sup> Similarly, minimum competency testing is "a program in which students are tested to determine their mastery of certain skills defined as essential aspects of school learning or essential aspects of school learning or essential for performing tasks routinely confronted in adult life."<sup>13</sup>

These definitions demonstrate the first basic point on which the various state statutes differ. Should the students be tested on basic academic skills, or on life skills, necessary to function in society?

An item testing academic skills may require the student to simply add a series of numbers or correct a grammatical error;<sup>14</sup> life skills questions test more practical skills such as reading a newspaper, balancing a check-book, or preparing a tax form.<sup>15</sup> "The [academic skills] . . . item will indicate whether the student is ready for the next course in school; the [life skills question] . . . will indicate whether the student is ready for the shopping center. Both are important,"<sup>16</sup> but schools cannot

discussion of this case may be found in THE EDUCATION COMMISSION OF THE STATES LAW AND EDUCATION CENTER, FOOTNOTES No. 25 (June 1980).

<sup>12</sup> Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J.L. AND EDUC. 145, 146 (1979).

<sup>13</sup> RAMSBOTHAM, THE STATUS OF MINIMUM COMPETENCY PROGRAMS IN TWELVE SOUTHERN STATES: A SOUTHEASTERN PUBLIC EDUCATION PROGRAM REPORT 123 (1980) (glossary) [hereinafter cited as SEPEP REPORT].

<sup>14</sup> A school skills question might resemble this one from the Denver Proficiency and Review Test:

1. Add the following set of numbers:

978  
669  
435  
+587

The correct answer is:

(A) 2568, (B) 2569, (C) 2659, (D) 2669, (E) NONE.

quoted in Lewis, *supra* note 12, at 146, n. 10.

<sup>15</sup> A life skills question, might read:

A warning on a medicine label may read: Severe sore throat or sore throat accompanied by fever, headache, nausea, or vomiting may be serious. Consult a physician immediately. If rash or irritation develops stop using and consult a physician. Do not use more than 5 days or give to children under 3 years of age unless directed by physician. According to the label, if you have a sore throat, fever, and a headache, you should

- (A) use the medicine for 5 days
- (B) call a doctor as soon as you can
- (C) increase the amount of medicine you take
- (D) use other medication to cure the fever and headache.

Example designed by the Educational Testing Service, included in AMERICAN FRIENDS SERVICE COMMITTEE, A CITIZEN'S INTRODUCTION TO MINIMUM COMPETENCY PROGRAMS FOR STUDENTS 12-13 (1978), quoted in Lewis, *supra* note 12, at 146, n.10.

<sup>16</sup> Brickell, *supra* note 4, at 589.

test all skills at all grades; the cost is prohibitive.<sup>17</sup> For this reason, different testing combinations have been proposed: "school skills for the college-bound and life skills for the job-bound . . . school skills for promotion to the next grade and life skills for graduation from school."<sup>18</sup>

Although "[t]he public is apparently concerned with poor student performance on the job,"<sup>19</sup> academic skills, rather than life skills, are usually taught in the schools.<sup>20</sup> "The assumption appears to be that school skills—reading, writing, and arithmetic—will make an automatic transfer to on-the-job skills."<sup>21</sup> Thus, some educators believe that

a student with basic literacy skills will have no difficulty passing an adult-life skills test even if he or she has not been exposed to adult-life skills in the classroom. They argue that students who can add and subtract a series of four-digit numbers on a basic numeracy skills test item, for example, will be able to do the same in the context of a tax form on an adult-life skills test. However, many students . . . will have difficulty with the kind of transference skills called for in an adult-life skills item . . . Therefore, school districts that plan to test for adult skills should have curricula and instruction that emphasize transference as well as the other knowledge and skills necessary to answer the adult-life skills items.<sup>22</sup>

Furthermore, an adult-life skills item such as a tax form is "more difficult than its basic numeracy components [partially because] . . . (1) the

<sup>17</sup> Even without taking into consideration the cost of remedial programs, additional administrators, legal fees, enforcement costs, and auditing and checking expenses, one author has estimated that the set-up costs, including studies and data collecting, are likely to be "in the neighborhood of \$50,000" for one year with only one staff member working on the project. Anderson & Lesser, *The Costs of Legislated Minimum Competency Requirements*, 59 PHI DELTA KAPPAN 606 (May 1978).

The implementation costs ("information about the effects, . . . pilot testing, . . . model[s] . . . of the financial impact . . . administrative, record keeping, and reporting expenses") will total an estimated \$51,500 to \$198,200. *Id.* at 606-07.

"The cost of test development—the writing of items, pilot testing, revising . . . runs from \$25 to \$210 per item . . . [Thus if] only 10 criteria are to be measured, and . . . only 10 items are required to measure each criterion . . . [to measure three times] test development costs will run between \$15,000 and \$63,000 . . ." *Id.* at 607.

The work of printing, mailing, scoring, and reporting results . . . can be done for between 50 cents and \$1.55 per student, assuming that classroom teachers administer the test and that no charge is made for their time. States using contractors for test administration report costs of just under \$1 . . . through \$13 per student.

*Id.* These costs were reported in 1978; undoubtedly they have since risen.

<sup>18</sup> Brickell, *supra* note 4, at 589.

<sup>19</sup> Pipho, *supra* note 8, at 586.

<sup>20</sup> "Interest rates, checkbooks, tax forms, etc., were included in the 7-8 grade arithmetic books in the 40's and 50's but dropped out of sight in the 60's with the advent of modern math." McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 685 (1979).

<sup>21</sup> Pipho, *supra* note 8, at 586.

<sup>22</sup> McClung, *supra* note 20, at 684-85.

forms usually require literacy as well as numeracy skills, and (2) an official form can be distracting and intimidating."<sup>23</sup>

Life skills are undoubtedly important in the real world but perhaps the schools are not the appropriate places to learn them or to test them. Or perhaps "paper and pencil" tests are not the best way to test adult life skills. A practical alternative would be to test life skills in

real-life situations, for example, checking the accuracy of bills and sales slips, using the public library, using the town and state offices. "These competencies are most validly measured by the most direct means possible, situational or performance examinations which determine if the student can actually perform the behaviors."<sup>24</sup>

Admittedly, "direct measurement is often costly and time consuming,"<sup>25</sup> perhaps more so than paper and pencil tests. Yet perhaps a sample of students could be directly measured in various life skills to determine whether or not their paper and pencil performance really is indicative of their ability to function in those areas; if it is not, the paper and pencil test could be revised. Similarly, "if a student cannot pass a paper-and-pencil competency test, perhaps that student should be given a direct performance test to be sure that he or she does not have the requisite skills before denying him or her a diploma."<sup>26</sup>

One educational testing requirement which may steer schools away from testing life skills is the requirement of instructional match. The basic rationale behind the requirement is that it is unfair to test a student on what she has never been taught.<sup>27</sup> In other words, the school's curriculum and instruction must in some way be matched to whatever is to be measured by the competency test.<sup>28</sup>

One author has broken instructional match down into two categories: curricular validity and instructional validity. "Curricular validity is a measure of how well test items represent the objectives of the curriculum. An analysis of curriculum validity would require comparison of the test objectives with the school's course objectives."<sup>29</sup> If the curriculum does not call for instruction in the objectives which are later tested "failure on the competency test should reflect on the schools,"<sup>30</sup> not on the individual pupils. "Even if the curricular objectives of the school correspond with the com-

<sup>23</sup> *Id.* at 685.

<sup>24</sup> *Id.* at 708 (citing Madaus & Airasian, *Issues in Evaluating Student Outcomes in Competency-Based Graduation Programs*, 10 J. RESEARCH & DEV. EDUC. 79, 86 (1977)).

<sup>25</sup> McClung, *supra* note 20, at 708.

<sup>26</sup> *Id.*

<sup>27</sup> Lewis, *supra* note 12, at 160.

<sup>28</sup> McClung, *supra* note 20, at 682.

<sup>29</sup> *Id.* (footnotes omitted).

petency test objectives, there must be some measure of whether the school's *stated* objectives were translated into topics actually taught in the district's classrooms."<sup>31</sup> "[I]nstructional validity is an actual measure of whether the schools are providing students with instruction in the knowledge and skills measured by the test."<sup>32</sup>

In addition to curricular and instructional validity, competency tests should be evaluated to insure predictive validity and content validity. If a student's score is not an accurate measure of his capacity to function as an adult, the test does not meet the requirement of predictive validity;<sup>33</sup> it does not predict what it is supposed to predict. Likewise, if a test does not actually measure what it purports to measure, *i.e.*, it does not indicate knowledge in the subject it allegedly tests, it does not meet the standards for content validity.<sup>34</sup> The four types of validity are somewhat interrelated, but a test that meets the requirements for one type of validity may still fail when tested for another type of validity.<sup>35</sup>

Evaluating a test's validity and match is a technical, time-consuming and expensive process.<sup>36</sup> Yet validity and match are of undeniable importance. Regardless of what steps are taken to assure validity and instructional match, "[a] school system that cannot ensure the . . . validity of its competency tests should not use them as a basis for denying promotion or a diploma to any of its students."<sup>37</sup>

Closely related to validity is the educational concept of reliability. While "validity demonstrates what may be properly inferred from a test score,"<sup>38</sup> reliability indicates "whether the [test] instrument measures ac-

<sup>31</sup> *Id.* at 682-83 (emphasis added).

<sup>32</sup> *Id.* at 683.

<sup>33</sup> Lewis, *supra* note 12, at 159-60 and n.110, 111.

<sup>34</sup> *Id.*; McClung, *supra* note 20, at 683.

<sup>35</sup> For example, content validity "does not ensure either curricular or instructional validity." McClung, *supra* note 20, at 683.

<sup>36</sup> For example, "[t]he cost of a proposed construct validity study for Florida's functional literacy test was \$28,446." Lewis, *supra* note 12 at 161, n.116.

Construct validity is a measure of how well test items correlate to the theory or constructs behind the test . . . . This assessment is probably the most difficult to conduct since it may be difficult to identify the constructs upon which a test is built and because a statistical analysis . . . may be required.

McClung, *supra* note 20, at 667. Any statistical study of a test's validity will be expensive. The school system may have to balance this cost against the cost to the students' of depriving them of a promotion or advancement due to an invalid testing device. See Lewis, *supra* note 12, at 160-61.

<sup>37</sup> McClung, *supra* note 20, at 684 (referring only to curricular and instructional validity). Some schools do not use their competency tests to make promotion or graduation decisions. See *infra* notes 59-67 and accompanying text. A test's validity may, in addition, raise certain questions, especially regarding due process. See *infra* notes 75-87 and accompanying text. See McClung, *supra* note 20, at 666-67 and the materials cited therein for a more detailed discussion of validity.

<sup>38</sup> Lewis, *supra* note 12, at 159.

curately what it measures; for example, the instrument should yield comparable results when used at different times.”<sup>39</sup> That it often does not is demonstrated by the differing difficulty of test items which were designed to measure the same objectives. One author has noted that “two people can look at the same objective and one will write an easy [test] item and the other will write a hard item.”<sup>40</sup>

As if questioning a test’s reliability, validity, and match was not enough to boggle the mind of anyone who is not well-versed in educational measurement, educators have also hotly debated the question of whether competency tests should be criterion-referenced or norm-referenced. A criterion-referenced test is one “on which an individual pupil’s performance is interpreted in terms of his or her performance on a set of prespecified objectives or competencies.”<sup>41</sup> A norm-referenced test, on the other hand, is one “on which an individual pupil’s performance is interpreted in terms of his or her standing relative to the performance of other pupils who took the test;”<sup>42</sup> commonly called grading on a curve.

The fundamental argument against criterion-referenced tests is that setting a standard against which students will be measured is arbitrary and authoritarian.<sup>43</sup> The trend, however, seems to be towards favoring criterion-referenced tests over norm-referenced ones. The National Education Association has recommended that test items be criterion-referenced<sup>44</sup> and several state statutes have mandated it.<sup>45</sup> A practical argument illustrates the advantage of using a criterion-referenced test:

[t]o establish an arbitrary passing score based on a norm can fail to

<sup>39</sup> McClung, *supra* note at 666, (citing AMERICAN PSYCHOLOGICAL ASSOCIATION STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1974)). Federal guidelines often defer to the APA Standards. *Id.* at 665.

<sup>40</sup> Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602, 604 (May 1978). For example, two questions from a New Jersey examination test the objective, ‘adding single-digit numbers.’ But in one item the digits are arranged vertically and in the other they are arranged horizontally. Of third-grade pupils, 86% got the vertical item correct and 46% got the horizontal item correct. [Similarly,] . . . two items from the Stanford Reading Test that both test the objective. ‘The pupil should be able to discriminate the grapheme combination “vowel + r”.’ Item 1): ‘Mark the word “firm”.’ (And the proctor reads ‘firm,’ ‘form,’ and ‘farm.’) Item 2): ‘Mark the word “girl”.’ (And the proctor reads ‘goal,’ ‘girl,’ and ‘grill.’) The difficulty for examinees of Item 1 is 56%; for Item 2 it’s 88%. *Id.*

If, in the interest of test security, some students were given all “Item 1s” and other students were tested exclusively on “Item 2s,” their pass/fail rates might not be reliable indicators of their knowledge of the stated objectives.

<sup>41</sup> SEPEP REPORT, *supra* note 13, at 122 (glossary).

<sup>42</sup> *Id.* at 123 (glossary).

<sup>43</sup> McClung, *supra* note 20, at 669 (citing Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602, 602-05 (May, 1978) and Glass, *Standards and Criteria*, 15 J. EDUC. MEASUREMENT 237, 259 (1978)).

<sup>44</sup> NEA Instruction and Professional Development (Standards), cited in Pipho, *Minimum Competency Standards*, TODAY’S EDUCATION 34, 36 (Feb.-Mar. 1978).

<sup>45</sup> See, e.g., ARK. STATS. ANN. § 80-154 (1980); CAL. EDUC. CODE § 51216 (West Supp. 1981).



insure mastery by all pupils (when the majority of pupils are deficient in the basics) or doom some students to failure (when all students have mastered the skills with insignificant differences in pupil performance).<sup>46</sup>

In other words, if all the student scores are in the 30-40% range out of a possible 100 points, it can hardly be argued that any of the students have mastered the objective, yet those at the top of the group would pass if the test was norm-referenced. Likewise, if the students' scores were all between 90 and 100%, those at the bottom of the group would fail even though they would appear to have mastered the skill. "Criterion-referenced tests . . . overcome such shortcomings by measuring students against objective standards rather than against themselves."<sup>47</sup>

Another decision legislators will have to face when developing an educational assessment program is whether the tests should be standardized on a state or local level. The most obvious argument for locally developed tests is that local school boards have traditionally had jurisdiction to establish graduation and grade promotion standards.<sup>48</sup> Some legislators "feared that local governing boards, increasingly sensitive to legislative encroachments, would fight a prepackaged program."<sup>49</sup> In addition, "a statewide test cannot be tailored to the diverse instruction and curricula that has been offered in local districts, and it will take a number of years for curriculum and instruction to adapt themselves to the test."<sup>50</sup> Thus it will be more difficult for a statewide test to meet the requirements of validity and match discussed earlier.<sup>51</sup>

There are, however, many equally valid arguments for setting statewide standards. First is the advantage of uniformity. Future employers and college admissions officers would know exactly which competencies had been measured and mastered and students changing schools would not be confronted with new requirements and standards within the same state.<sup>52</sup> Secondly, "designing a reliable and valid test that meets professional psychometric standards is beyond the expertise . . . of most local districts."<sup>53</sup>

A third compelling argument for statewide testing involves the cost

<sup>46</sup> Hart, *supra* note 5, at 593.

<sup>47</sup> McClung, *supra* note 20, at 670 (citing POPHAM, CRITERION-REFERENCED MEASUREMENT (1978)).

<sup>48</sup> Pipho, *supra* note 8, at 586.

<sup>49</sup> Hart, *supra* note 5, at 593; *see also* McClung *supra* note 20, at 667.

<sup>50</sup> McClung, *supra* note 20, at 668. This raises the "classic controversy about whether tests should lead or follow curriculum, and whether teachers should 'teach to the test.'" *Id.* (footnotes omitted). This controversy is about as easily solved as the one which asks, "Which came first, the chicken or the egg?"

<sup>51</sup> *See supra* notes 27-37 and accompanying text.

<sup>52</sup> McClung, *supra* note 20, at 667-68.

<sup>53</sup> *Id.* at 668.  
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of developing and implementing a competency testing program. When multiplied by the number of students in a district, the costs of a testing program rapidly become prohibitive.<sup>54</sup> Thus "states that mandate decentralized programs are also mandating high development costs."<sup>55</sup>

A related cost, the value of which is not seriously debated, is the add-on cost of remedial instruction which should be provided when students fail the tests. Most educators agree that the tests are not of much value if those who fail are not given remedial instruction.<sup>56</sup> However, "the greatest cost in competency requirements arises when it becomes obvious that much remedial work is necessary."<sup>57</sup>

Remediation poses another problem for school administrators: "officials will have to choose between the expense of after-school remedial programs and the juggling of schedules in regular school hours to provide other work for students who receive passing marks."<sup>58</sup>

Some state statutes limit the use of competency test results to identifying those in need of remediation (diagnostic purposes);<sup>59</sup> others provide that the tests must be passed as a prerequisite to grade promotion or graduation.<sup>60</sup> Arguments for using competency tests as an exit requirement include the rationale that

sending students into the world without basic skills is a greater disservice to them than diploma denial, and that a high school diploma based on social promotion rather than achievement does not mean much anyway . . . . Others will not try to minimize the injury of diploma denial, but will argue that schools have a responsibility to certify competence for employers, educational institutions and society at large . . . . [Another] argument is that a serious penalty is necessary to motivate students and teachers.<sup>61</sup>

Thus, the argument continues, if legislation did not include an exit sanction,

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<sup>54</sup> See *supra* note 17 for a discussion of the costs involved in implementing a competency testing program.

<sup>55</sup> Anderson & Lesser, *supra* note 17, at 607.

<sup>56</sup> Lewis, *supra* note 12, at 152; Mahon, *Competency Based Education—What Are the Legal Issues?* 64 NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS BULLETIN 98 (Feb. 1980).

<sup>57</sup> Anderson & Lesser, *supra* note 17, at 607. According to one author's compilations, [t]he state of Washington has estimated that its remedial programs—one in math and one in reading—will require between \$43 million and \$47 million each. New Jersey expects its bill for compensatory programs to rise from \$30 million in 1976-77 to \$70 million in 1978-79. Michigan spends some \$28 million and Florida plans to spend \$10 million to help students pass competency examinations. A 1972 California report proposed \$500 million for compensatory education. *Id.*

<sup>58</sup> Lewis, *supra* note 12, at 149, n.31 (quoting The N.Y. Times, Dec. 7, 1977).

<sup>59</sup> See, e.g., ARK. STATS. ANN. § 80-155 (1980).

<sup>60</sup> See, e.g., CAL. EDUC. CODE § 51217 (West Supp. 1981).

<sup>61</sup> McClung, *supra* note 20, at 658-659.

"many school districts would ignore [the law, and] . . . students would be passed from grade to grade without acquiring the [necessary] skills."<sup>62</sup>

The strongest objection to using test results as a requirement for graduation is that "it is the student who suffers, . . . even if it is really the teacher or school that is at fault."<sup>63</sup> In addition, applying an exit sanction may cause teachers to "teach to the test" and ignore or neglect subjects the students will not be tested on or the application of the test subjects to the real world.<sup>64</sup> This is of special concern in states which allow students to graduate early if they can pass the proficiency exam.<sup>65</sup> The National Education Association has suggested that "in no case will written tests be the sole criterion for either movement from grade to grade or graduation from secondary school."<sup>66</sup> In addition, Joseph A. Califano, Jr., as the Secretary of Health, Education, and Welfare warned that "[t]ests are tools—not magic wands. Even with the most sophisticated tests, the assessment of learning will still require sensitive judgments about a child's human development. Tests can help inform such judgments; tests cannot make them."<sup>67</sup>

Before discussing the legal issues surrounding minimum competency testing, one further issue that will face legislators about to implement an educational assessment program should be discussed. When making funding decisions, the legislator's instinctive reaction might be to provide funds to the districts that appear to need additional help. This need would probably be manifested in low test scores and relatively high failure rates. One commentator has pointed out that this approach is totally erroneous and likely to be counterproductive.

The state agencies . . . should reward good performance . . . . [W]hen poor behavior is given attention it tends to persist.

. . . They are rewarding poor performance on the part of schools by providing funds to hire personnel and purchase materials. School districts that perform well will be denied these benefits. Moreover, once a school system has become accustomed to these state payments, it will find it difficult to give them up . . . . If states are going to provide compensatory education money at all, they should provide it only to districts that show high levels of achievement.<sup>68</sup>

<sup>62</sup> Hart, *supra* note 5, at 594.

<sup>63</sup> Lewis, *supra* note 12, at 149 (citing Madaus & Airasian, *Issues in Evaluating Student Outcomes in Competency-Based Graduation Programs*; 10 J. RESEARCH & DEV. EDUC. 79, 82 (1977)).

<sup>64</sup> SEPEP REPORT, *supra* note 13, at 130.

<sup>65</sup> See, e.g., CAL. EDUC. CODE § 48412 (West 1978).

<sup>66</sup> NEA Standards, *cited in* Pipho, *Minimum Competency Standards*, TODAY'S EDUCATION 34, 36 (Feb.-Mar. 1978).

<sup>67</sup> Joseph A. Califano, Jr., Secretary of H.E.W., speaking before the 1977 annual meeting of the College Entrance Examination Board, *quoted in* Pipho, *Minimum Competency Standards*, TODAY'S EDUCATION 34, 35 (Feb.-Mar. 1978).

<sup>68</sup> Anderson & Lesser, *supra* note 17, at 608.

## THE LEGAL ISSUES

Once all of the educational issues have been resolved by the state legislators and they have decided which combination of the variety of provisions they wish to adopt in their state and have actually enacted the law, it might appear that the hardest issues have been resolved and everyone can sit back and watch the fully competent graduates emerge from the high schools to be received with open arms by waiting employers and colleges. "[P]olicy makers may believe that it is sufficient to cause something to occur by legislating that it should occur."<sup>69</sup> Unfortunately, this may not be what happens at all. What about the students who have failed the tests and the parents and community groups who are unhappy with the way the tests were administered or the way the results were used? Passage of the statute merely opens the doors to litigation.

Yet, "[c]ourts have traditionally been reluctant to review cases questioning the adequacy of educational programs or the validity of professional judgments about academic performance of students"<sup>70</sup> due to their extremely subjective nature.

The counterargument is that competency tests, unlike regular classroom examinations "are specifically designed to provide relatively objective criteria for making the crucial evaluation of academic performance."<sup>71</sup> In addition to the greater objectivity of competency tests, the

courts will no longer be faced with a challenge to a graduation decision based upon 'an expert evaluation of cumulative information' — that is, hundreds of tests in scores of classes graded by numerous teachers using complex personal mixes of objective and subjective criteria. Instead, courts will be asked to review . . . a decision based primarily upon the result of one test instrument purported to incorporate test items that are objectively related to clearly specified performance objectives and explicit educational goals.<sup>72</sup>

"[T]he barrier of subjectivity is removed. Competency in basic skills, unlike a student's knowledge of American history, looks more like an ascertainable fact."<sup>73</sup> Thus "the courts' primary rationale for past restraint is far less persuasive in the [competency testing] . . . situation, and . . . judicial review is warranted."<sup>74</sup>

One claim that may be brought before the courts based on competency testing programs is that the test itself and/or the manner in which its re-

<sup>69</sup> Wise, *Minimum Competency Testing: Another Case of Hyper-Relationalization*, 59 *PHI DELTA KAPPAN*, 596, 597 (May 1978).

<sup>70</sup> McClung, *supra* note 20, at 660-61.

<sup>71</sup> *Id.* at 663.

<sup>72</sup> *Id.*

<sup>73</sup> Lewis, *supra* note 12, at 165.

<sup>74</sup> McClung, *supra* note 20, at 664.

sults are used by schools violates the fourteenth amendment Due Process clause.<sup>75</sup> In *Debra P. v. Turlington*, the 1979 case which challenged Florida's functional literacy exit examination, the plaintiffs focused on the fact that they had not been given adequate notice prior to the implementation of Florida's functional literacy tests, and that therefore the school board's schedule of implementation violated their fourteenth amendment due process right to timely notice.<sup>76</sup>

Since a plaintiff's right to due process is protected only when an interest in life, liberty, or property can be identified, the court first considered whether or not one of these interests was implicated. The court found that the plaintiffs had "a property right in graduation from high school with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the SSAT II requirement."<sup>77</sup> This property interest arises because the state makes school attendance mandatory; thus "public education is not a mere 'unilateral expectation' but an understanding between the state and the student that both are to benefit from compulsory school attendance: the state by securing an enlightened citizenry, the student by securing the fundamental prerequisites of economic livelihood . . . . [T]he state's role in urging [the attainment of a diploma] create[s] an entitlement,"<sup>78</sup> and thus a property interest of which the plaintiff may not be deprived without due process.

In addition, the court found that the plaintiffs had "a liberty interest in being free of the adverse stigma associated with the certificate of completion,"<sup>79</sup> a differentiated diploma which Florida gave to students who had fulfilled the other requirements for graduation, but who had failed the SSAT II functional literacy exam.

Traditionally, once it is determined that the plaintiff has liberty and property interests at stake, the court applies a balancing test to determine what process is due before the state can infringe upon those interests. There are three factors involved: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; . . . and finally, the Government's interest, including . . . the fiscal and administrative burdens that the additional or substitute requirement would entail."<sup>80</sup> The *Debra P.* court indirectly addressed each of these concerns. The court implied that the plaintiff interest in receiving a diploma upon fulfillment of the original re-

<sup>75</sup> U.S. CONST. amend. XIV § 1.

<sup>76</sup> 474 F. Supp. 244, 263 (1979).

<sup>77</sup> *Id.* at 266 (citing *Goss v. Lopez*, 491 U.S. 565, 574 (1975)).

<sup>78</sup> Lewis, *supra* note 12, at 154-55. See *Goss v. Lopez*, 491 U.S. 565 (1975).

<sup>79</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 266 (1979) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). See also *Goss v. Lopez*, 491 U.S. 565 (1975).

<sup>80</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

quirements for graduation was undermined when the school board changed the requirements for graduation.<sup>81</sup> As to the second factor, the court pointed out that the state failed "to carry out equating studies",<sup>82</sup> *i.e.*, studies to determine the validity and reliability of the tests.<sup>83</sup> This seems to indicate a substantial risk of error implicit in the tests as applied. Studies which might have disproved this conclusion were not undertaken, thus the court could not conclude that the risk of error was minimal. The stated interests of the school board were:

that the momentum, interest, credibility, and support of Florida public education now present will be undermined if the Court finds the test or implementation schedule invalid. The Defendants are further concerned that they will be without a sanction or deterrent if the Court voids the linkage of the functional literacy test to the diploma.<sup>84</sup>

But the court did not invalidate the "linkage;" it held only that the implementation schedule as it stood was unconstitutional since it did not provide sufficient notice before the imposition of the sanction.<sup>85</sup> In granting injunctive relief, the court made it clear that "[a]t the end of the injunctive period, the state will be permitted to pursue its educational policies and goals free of intervention."<sup>86</sup>

The injunction was granted for two reasons: first, the lack of timely notice and the consequent deprivation of due process and secondly, because the system needed time to "purge the taint of past segregation."<sup>87</sup>

This was the focus of the plaintiffs' equal protection claim. Actually, this claim was a combination of three claims, each with its own statutory or constitutional support. First, plaintiffs invoked the language of the fourteenth amendment: "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>88</sup> Secondly, the plaintiffs claimed the protection of Title VI of the Civil Rights Act of 1964 which states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>89</sup> Plaintiff's third focus was on the Equal Educational Opportunities Act which provides that "[n]o state shall deny equal educational opportunity to an individual on account of his or her

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<sup>81</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 267 (1979).

<sup>82</sup> *Id.*

<sup>83</sup> See text accompanying notes 27-40 *supra*.

<sup>84</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 267 (1979).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 269.

<sup>87</sup> *Id.*

<sup>88</sup> U.S. CONST. amend. XIV § 1.

<sup>89</sup> 42 U.S.C. § 2000d (1976).

race, color, sex, or national origin, by— . . . (b) the failure of an educational agency which has formerly practiced . . . deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system.”<sup>90</sup>

The gist of these three claims is that competency tests unfairly discriminate against black students. “That black youngsters score less successfully on standardized test instruments has been widely acknowledged.”<sup>91</sup>

Under the Equal Protection clause of the United States Constitution there are two separate standards, one of which will be applied by the courts in deciding whether or not a person’s equal protection rights have been violated.<sup>92</sup> In the context presented by *Debra P.*, the first standard holds the plaintiffs to the burden of proving a “discriminatory purpose when challenging competency testing programs in school districts not recently desegregated or found to be subject to prior discrimination.”<sup>93</sup> Typical factors which “might have probative value in proving intent [include]: historical background, . . . legislative history, and testimony from officials.”<sup>94</sup> However,

[w]hen . . . [school board] actions have the ‘natural probable, and foreseeable result of increasing or perpetuating segregation,’ a *presumption* of segregative purpose is created. The burden of proof then shifts to defendant officials . . . to demonstrate that no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect.”<sup>95</sup>

In deciding *Debra P.*, the court really did not have to reach the issue of intent to discriminate since the case actually fits into the second subcategory

<sup>90</sup> 20 U.S.C. § 1703 (1976).

<sup>91</sup> Lewis, *supra* note 12, at 166. See graph comparing the scores of black and white students in Florida, at Appendix B. The fact that “historically black children have not fared well on standardized tests in Florida schools” was stipulated in *Debra P. v. Turlington*, 474 F. Supp. 244, 249 (1979).

<sup>92</sup> In *Debra P.*, the court does not discuss the fourteenth amendment equal protection claim, the Title VI claim and the Equal Educational Opportunity claim individually. Actually, the opinion blurs the distinction between the claims and particularly between the two subcategories of equal protection, one of which requires a demonstration of intent or purposeful discrimination, and the other under which a showing of discriminatory effect or impact is sufficient. The law review articles which will be relied on are much more effective in providing guidelines for future equal protection claims in the competency testing context. As a matter of fact, the Lewis article, *supra* note 12, and the McClung article, *supra* note 20, as well as others, are cited in *Debra P.* as having been “of considerable assistance” to the court. *Debra P. v. Turlington*, 474 F. Supp. 244, 253 n.17 (1979).

<sup>93</sup> McClung, *supra* note 20, at 690 (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> *Arthur v. Nyquist*, 573 F.2d 134, 142-43 (2d Cir. 1978), *cert. denied*, 439 U.S. 860 (1978) (emphasis added); McClung, *supra* note 20, at 690. See also *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (“For normally the actor is presumed to have intended the natural consequences of his deeds.”); *United States v. Texas Educational Agency*, 564 F.2d 162 (5th Cir. 1977), *rehearing denied*, 579 F.2d 910 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 3106 (1979) (to the same effect).

of equal protection discussed below. However, the court "held" that there was insufficient proof of a present intent to discriminate<sup>96</sup> even though the Florida Commissioner of Education, Ralph Turlington, "acknowledged that he had . . . anticipated a high black failure rate with regard to implementation of the SSAT II testing program,"<sup>97</sup> as did numerous other Florida Department of Education employees who testified. The court approved the statement that a person is presumed to have intended the natural consequences of his act, not as dispositive of the issue, but as one factor which may be considered,<sup>98</sup> although here it apparently was not compelling.

Even in this first category, where a *prima facie* case of discriminatory purpose or intent is established by the plaintiffs, the defendants may be able to rebut the charge by showing that the goal (of increased proficiency in basic skills) was permissible and no other method will achieve the goal in a less discriminatory manner.<sup>99</sup>

However, in the second category of equal protection claims, "the existence of a permissible purpose cannot sustain an action that has an impermissible effect."<sup>100</sup> In the first category only purposeful "kicks" will demonstrate a violation of the Equal Protection clause; in the second category, even unintentional discrimination will constitute a violation. "One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear a certain functional resemblance to kicks."<sup>101</sup>

*Debra P.* falls within the second category (where only discriminatory effect need be proven) since the school system had only been integrated since 1971.<sup>102</sup> The court found that "[t]he vestiges of the inferior elementary education [the plaintiffs] . . . received are still present and affect their performance."<sup>103</sup> The functional literacy tests were administered as a requirement for graduation in the 1978-79 school year.<sup>104</sup> Due to the purposeful discrimination in the recent past, the court, following *Gaston County v. United States*,<sup>105</sup> noted that even "impartial administration of the literacy test today would serve only to perpetuate the inequities [of the past] in a

<sup>96</sup> *Debra P. v. Turlington* 474 F. Supp. 244, 254 (1979).

<sup>97</sup> *Id.* at 253.

<sup>98</sup> *Id.*

<sup>99</sup> Lewis, *supra* note 12, at 170.

<sup>100</sup> *Id.* at 174-75, n.190 (quoting *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972) (emphasis added)).

<sup>101</sup> Lewis, *supra* note 12, at 173, n.181 (quoting Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977)).

<sup>102</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 252 (1979).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 257.

<sup>105</sup> 395 U.S. 285 (1969). The *Gaston* case dealt with the use of a literacy test as a means of qualifying voters.



different form.”<sup>106</sup> Utilization of competency tests in a district which was physically integrated only seven years before the introduction of the testing may result in “‘resegregation’ within the school according to test results (or other forms of tracking) since unequal educational opportunities may cause black children to score lower than their white counterparts.”<sup>107</sup>

In *Debra P.* the court pointed out that ability grouping (even if it results in resegregation) may be acceptable in the future, but not until

the district has operated as a unitary system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday’s educational disparities. Such a bar period may be lifted when the district can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation.<sup>108</sup>

Here, the court found that the “black school children . . . ‘still wear [the] badge of their old deprivation—underachievement.’”<sup>109</sup> “[R]ace more than any other factor . . . is a predictor of success on the test.”<sup>110</sup> When this state of affairs no longer exists, “then a graduation requirement based on a neutral test will be permitted.”<sup>111</sup>

In summary, analysis of the fourteenth amendment equal protection claim will begin “with a determination of whether the disparities in test results between black and white students are so substantial as to support a finding of discriminatory effect”<sup>112</sup> or of “purposeful discrimination.”<sup>113</sup> “Plaintiffs would then have the burden of establishing a record of past discrimination. A prior desegregation decree would, of course, provide the clearest evidence.”<sup>114</sup> The burden of production then shifts to the defendant school system to show “that the effects of prior [segregation] . . . have dissipated”<sup>115</sup> or that the competency program is in fact being used to remedy the situation and equalize the students’ educational opportunities.<sup>116</sup>

In addition to their fourteenth amendment claims, the plaintiffs in

<sup>106</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 255 (1979) (quoting *Gaston County v. United States*, 395 U.S. 285, 297 (1969)).

<sup>107</sup> McClung, *supra* note 20, at 688.

<sup>108</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 255 (1979) (quoting *McNeal v. Tate*, 508 F.2d 1017, 1020-21 (5th Cir. 1975)).

<sup>109</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 256 (1979) (quoting *McNeal v. Tate*, 508 F.2d 1017, 1019 (5th Cir. 1975)).

<sup>110</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 256-57 (1979).

<sup>111</sup> *Id.* at 257.

<sup>112</sup> Lewis, *supra* note 12, at 176.

<sup>113</sup> *Id.* at 176, n. 199 (emphasis deleted) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

<sup>114</sup> Lewis, *supra* note 12, at 176.

<sup>115</sup> *Id.* (footnotes omitted).

<sup>116</sup> *Id.*

*Debra P.* asserted that Florida's functional literacy program discriminated against them in contravention of Title VI of the Civil Rights Act of 1964.<sup>117</sup> Their reliance on Title VI appeared to be well-placed in light of the H.E.W. Title VI regulations which incorporate the effect standard and prohibit school systems receiving funds from "utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin."<sup>118</sup> "Because virtually all public schools are subject to Title VI regulations,"<sup>119</sup> plaintiffs would need only show that the tests had a discriminatory effect to be protected by Title VI.

One caveat should, however, be noted. The United States Supreme Court's recent decision in *Bakke*<sup>120</sup> may have "undercut the effect standard incorporated in the Title VI regulations."<sup>121</sup> According to one commentator, *Bakke* provided that "Title VI proscribes only those racial classifications that would violate the Equal Protection clause if employed by a state or its agencies."<sup>122</sup> Therefore, Title VI may not still have its pre-*Bakke* effect of lightening the plaintiff's burden. *Debra P.* adds support to this theory by lumping the plaintiff's constitutional claim together with their Title VI claim in a one sentence determination that rights under both headings were violated.<sup>123</sup>

The plaintiffs in *Debra P.* also alleged a violation of their rights under the Equal Educational Opportunities Act which provides, in part, that "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin"<sup>124</sup> and specifies the prohibited practices. The court concluded that the plaintiffs' rights under this act had been violated, presumably for the same reasons the court enumerated in its discussion of the constitutional claim. It was not the test itself that the court objected to; it was the use of the test too soon after integration. Actually, although the court found that "some of the questions do have factual settings unfamiliar to certain racial groups . . . this distraction is minimal and unpervasive."<sup>125</sup> Thus the test was not racially biased.

The court enjoined the state of Florida

from requiring passage of the SSAT II as a requirement for graduation for a period of four (4) years. In the school term 1982-1983, the state

<sup>117</sup> 42 U.S.C. § 2000d (1976).

<sup>118</sup> 45 C.F.R. § 80.3(b)(2) (1980) (emphasis added).

<sup>119</sup> McClung, *supra* note 20, at 692.

<sup>120</sup> *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>121</sup> McClung, *supra* note 20, at 692.

<sup>122</sup> *Id.*

<sup>123</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 257 (1979).

<sup>124</sup> 20 U.S.C. §§ 1701-1758 (1976), especially § 1703.

<sup>125</sup> *Debra P. v. Turlington*, 474 F. Supp. 244, 261-62 (1979).

will be permitted to utilize the SSAT II as a requirement for graduation. In the interim the SSAT II can be administered . . . to assist in the identification and remediation of . . . skill objectives.<sup>126</sup>

Comprehensive as it was, the *Debra P.* case did not deal with all the possible challenges to state competency testing programs. In addition to claims based on due process and equal protection/discrimination, the tests may, in the future, be challenged on first amendment grounds. This class of claims has been labeled "inappropriate test content" by one commentator.<sup>127</sup> Three subheadings will be discussed herein as each could conceivably provide a basis for future litigation: (1) cultural bias; (2) coerced belief; and (3) invasion of privacy.<sup>128</sup>

Cultural bias is commonly perceived in a test that contains some items "that are especially more difficult for one group than another"<sup>129</sup> perhaps due to their different cultural backgrounds. "A 'cultural fair' test may be an impossible goal,"<sup>130</sup> yet two alternative solutions to the test have been expounded.

The first is a pluralistic test which "reflects all aspects of our . . . society . . . [and places] students at an equal advantage or disadvantage."<sup>131</sup> For example, "[a] functional competency test given in Miami or San Antonio . . . should include a number of Hispanic skill and content items, as some cross-cultural competence is arguably necessary for successful functioning in those cities."<sup>132</sup>

The other alternative is a culturally neutral test which usually means testing on attributes of the majority culture (white middle-class). The argument made by supporters of "culturally neutral" tests is that "success is defined by the majority culture, and all students regardless of background should be provided with the education and training necessary to function effectively in our predominantly white middle-class culture."<sup>133</sup> The problem with this type of test is that it tends to "exaggerate the extent of functional

<sup>126</sup> *Id.* at 269.

<sup>127</sup> McClung, *supra* note 20, at 672.

<sup>128</sup> One of McClung's subheadings has already been discussed: insufficient match between the test and the curriculum or instruction provided. See *supra* notes 27-32 and accompanying text. One was deleted as a repetitive subheading and used as a conclusion: unteachable or unmeasurable content. McClung, *supra* note 20, at 678-79.

<sup>129</sup> McClung, *supra* note 20, at 694.

<sup>130</sup> *Id.* at 695 (citing DYER, RACE AND INTELLIGENCE: AN EXAMINATION OF THE SCIENTIFIC EVIDENCE BY FOUR AUTHORITIES (1963)) which states that there are only two situations in which a competency test can be culturally fair: either everyone has to have access to the learning necessary for the test or else no one has access to the information. Dyer maintains that neither of these conditions is possible.

<sup>131</sup> McClung, *supra* note 20, at 695.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 696. <https://ideaexchange.uakron.edu/akronlawreview/vol15/iss1/6>

incompetence among blacks and other minorities"<sup>134</sup> since, for example, "[t]he ability to survive in a ghetto . . . is not measured by the test."<sup>135</sup> Thus it "does not measure an individual's competence in functioning in that part of society in which he or she lives every day."<sup>136</sup> Thus "it seems clear that competency tests which are culturally biased . . . will be subject to legal challenge."<sup>137</sup>

The second subcategory, coerced belief, deals with the complaint that competency test questions assume "that certain beliefs . . . are the correct and proper ones, and that students can fail a test and be denied a high school diploma if their answers do not conform to those officially deemed correct."<sup>138</sup> Justice Jackson, in his famous "fixed star" comparison stated that "freedom to differ" is an important constitutional right and that "[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>139</sup> "[T]he constitutional infirmity of a test cannot be cured by any consensual process such as majority vote by the legislature, school board, parents, or students."<sup>140</sup>

In addition to attempting to collect information about a student's "deviant" attitude . . . there is the ominous prospect that . . . classes may be created 'to remedy the problem'" and that diploma denial may result if the student refuses to change his or her views to conform to the views of the school board.<sup>141</sup> It is unlikely that the schools' traditional interest in first amendment cases, (maintaining discipline) will be strong

<sup>134</sup> *Id.* at 696, n. 223.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 698. (footnotes omitted).

<sup>138</sup> *Id.* at 674. For example, one question on a test given at Westside High School in Omaha, Nebraska read: "Which of the following would you expect to find in a democratic society?" The first item was: "Joe Smith gives voters \$5 each to vote for him." Findley, *Westside's Minimum Competency Graduation Requirements: A Program That Works*, 59 PHI DELTA KAPPAN 614, 617 (May 1978). A student's answer will depend upon his interpretation of the phrase "expect to find." If the phrase is understood to mean "might conceivably occur," the student would answer, correctly, that he *would* expect to find vote-buying in a democratic society.

On the other hand, if the student thinks that the question means: "Which of the following are typical characteristics of a democratic society?" the student would answer that bribery or vote-buying is *not* typical, legitimate, standard practice in a democratic society. The latter interpretation and consequent answer are, according to the official answers, incorrect. Students certainly are not taught in class that vote-buying is acceptable behavior in the United States' democracy, yet the student is penalized for stating that he would not expect to find illegal activities connected with democratic elections.

<sup>139</sup> McClung, *supra* note 20, at 675 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)).

<sup>140</sup> McClung, *supra* note 20, at 676.

<sup>141</sup> *Id.* at 678.

enough "to justify infringement upon the [student's] . . . interest in free expression."<sup>142</sup>

The third subcategory of the inappropriate test content claim is that the test is an invasion of privacy. In an interesting twist on the claim of coerced belief, one author has pointed out that "[t]he student might assert a privacy interest and simply refuse to disclose his or her opinions on [certain items] . . . whether or not they happen to coincide with the official view."<sup>143</sup>

An additional privacy right claim might arise "if the school cannot protect the confidentiality of the [test result] information."<sup>144</sup> However, most of the state competency testing statutes have a provision declaring that any compilation of test results is not a public record within the meaning of the state Freedom of Information Act.<sup>145</sup> This is the states' attempt to defend against this sort of claim. A complaint based on an invasion of the student's right to privacy will still probably focus on the fact that "[t]here is too much of a chance that the wrong people for the wrong reasons will be singled out and counselled in the wrong manner."<sup>146</sup>

A totally different type of litigation which has arisen concurrently with competency testing programs is the educational malpractice claim based on common law negligence principles. No one seems to agree on which came first, the testing or the lawsuits. A good number of the competency testing statutes were enacted in 1977. The two principal educational malpractice suits were decided in 1976 and 1978.<sup>147</sup> But whether the statutes were a response to the plea of illiterate students (manifested in their malpractice claims) for a decent education,<sup>148</sup> or the suits were first brought in response to the enactment of the statutes (with their apparent guarantee of an adequate education), educators have noticed that they are in a Catch-22 situation where "they may be sued whether or not they give a functionally illiterate student a high school diploma."<sup>149</sup> If they refuse to graduate the student or give him a differentiated diploma, they may be sued on the due process and equal protection grounds discussed above,

<sup>142</sup> *Id.* at 677.

<sup>143</sup> *Id.* at 678. The right to privacy, although it is not found in the express words of the Constitution, has been recognized and developed in the common law. *See, e.g., Roe v. Wade*, 410 U.S. 152 (1973).

<sup>144</sup> McClung, *supra* note 20, at 678.

<sup>145</sup> *See, e.g., ARK. STAT. ANN. § 80-157* (1980).

<sup>146</sup> Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) (the court invalidated a test designed to identify potential drug abusers on privacy grounds) *quoted in* McClung, *supra* note 20, at 677-78.

<sup>147</sup> *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976); *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978).

<sup>148</sup> *Peter W.* was initiated in 1972 and was apparently the first educational malpractice suit. *Chall*, *supra* note 3, at 351.

<sup>149</sup> McClung, *supra* note 20, at 661, n. 49.

but if they go ahead and allow the student to graduate with a standard diploma when he is in actuality functionally illiterate, he may sue them for negligence and breach of their duty to educate.

*Peter W. v. San Francisco Unified School District*<sup>150</sup> "appears to have been the first [educational] malpractice case . . . ever pursued in the U.S."<sup>151</sup> Peter W. was an eighteen year old who graduated from the defendant school system after having attended it for twelve years. He claimed that he had the reading ability of a fifth-grader and that the school system had negligently failed to recognize this and take steps to correct it.<sup>152</sup>

The plaintiff's first cause of action sounded in negligence and the court pointed out that the elements of a negligence claim are: "(1) facts showing a duty of care in the defendant, (2) . . . a breach of the duty, and (3) injury to the plaintiff as a proximate result."<sup>153</sup> The debate focused exclusively on whether or not the defendant owed the plaintiff a duty of care.<sup>154</sup> Peter W. argued that the fact that he was a public school student was sufficient to show a duty of care on three theories.

First, that the "[a]ssumption of the function of instruction of students imposes the duty to exercise reasonable care in its discharge."<sup>155</sup> This principle is familiar to any first year law student who has taken Torts. In *Black v. New York, New Haven & Hartford Railroad Co.*, where plaintiff (who was intoxicated) boarded defendant's train and defendant's servants helped him to disembark at his stop, the court, in finding that there was a negligence issue worthy of presentation to the jury said the defendant's servants "were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him, . . . and they were bound to use ordinary care in what they did."<sup>156</sup> Likewise, in a New York case where plaintiff became ill in defendant's department store and defendants took plaintiff to an infirmary and left her there, effectively isolating her from others who might have helped her "[the] defendant assumed its duty by meddling in matters in which legalistically it had no concern."<sup>157</sup> "[I]f a defendant undertakes a task,

<sup>150</sup> 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976). This case was previously known as *Doe v. San Francisco Unified School Dist.*

<sup>151</sup> Chall, *supra* note 3, at 351.

<sup>152</sup> 60 Cal. App.3d at 818, 131 Cal. Rptr. at 856 (1976).

<sup>153</sup> *Id.* at 820, 131 Cal. Rptr. at 857 (citing 3 WITKIN, CAL. PROCEDURE (PLEADING § 450) 2103 (2d ed. 1971)).

<sup>154</sup> 60 Cal. App.3d at 820, 131 Cal. Rptr. at 857.

<sup>155</sup> *Id.*

<sup>156</sup> 193 Mass. 448, 450, 79 N.E. 797, 798 (1907).

<sup>157</sup> *Zelenko v. Gimbell Bros.*, 158 Misc. 904, 905, 287 N.Y.S. 134, 135 (Sup. Ct. 1935). See also *Hernandez v. Toney*, 289 So.2d 318 (La. App. 1973) and *RESTATEMENT (SECOND)*

even if under no legal duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task."<sup>158</sup>

These cases can certainly be analogized to the situation presented in *Peter W.* where the school district undertook to educate all school age children in the district yet failed to complete its undertaking in a satisfactory manner. Nevertheless, the court summarily dismissed the first part of Peter W.'s claim citing "want of relevant authority."<sup>159</sup>

Plaintiff's second theory upon which he based his negligence claim was that "[t]here is a special relationship between students and teachers which supports [the teachers'] duty to exercise reasonable care."<sup>160</sup> The court dismissed this contention and plaintiff's third theory (which was basically the same) with very little discussion.

In short, plaintiff's common law negligence claim was dismissed for reasons of public policy and "[f]or want of relevant authority,"<sup>161</sup> although the court did recognize that new areas of tort liability may open up if they are "comprehensible and assessable within the existing judicial framework."<sup>162</sup>

The court acknowledged that the general rule is that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct"<sup>163</sup> but noted that a departure from this rule is permissible when the departure is "clearly supported by public policy."<sup>164</sup> After weighing many factors which are pertinent to a decision on whether or not public policy favors "judicial recognition of [a] . . . duty in the defendant,"<sup>165</sup> including

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with the resulting liability for breach. . . . the availability, cost, and prevalence of insurance for the risk involved

<sup>158</sup> *Zelenko v. Gimbell Bros.*, 158 Misc. 904, 905, 287 N.Y.S. 134, 135 (Sup. Ct. 1935).

<sup>159</sup> *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App.3d at 821, 131 Cal. Rptr. at 858.

<sup>160</sup> *Id.* at 820, 131 Cal. Rptr. at 858.

<sup>161</sup> *Id.* at 821, 131 Cal. Rptr. at 858.

<sup>162</sup> *Id.* at 824, 131 Cal. Rptr. at 860.

<sup>163</sup> *Id.* at 823, 131 Cal. Rptr. at 859 (quoting *Rowland v. Christian*, 69 Cal.2d 108, 112, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968), paraphrasing CAL. CIV. CODE § 1714 (West Supp. 1981)).

<sup>164</sup> *Id.*

<sup>165</sup> *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App.3d at 822, 131 Cal. Rptr. at

. . . the possibility of 'feigned claims,' and the difficulty of [proving] . . . a particular injury,<sup>166</sup>

the court concluded that the burden to the public of recognizing such a duty of care in the schools outweighed the plaintiff's individual interest. Thus the court found that, for reasons of public policy, there was no duty of care owed to the plaintiff, so his negligence claim failed.<sup>167</sup>

The plaintiff advanced two additional claims which were based on theories other than negligence. The first was the district's alleged breach of a mandatory (statutory) duty under code sections which, according to plaintiff, provide *inter alia* that the district should keep parents advised of the student's educational progress (or lack thereof),<sup>168</sup> instruct students "in the basic skills of reading and writing,"<sup>169</sup> and "not . . . graduate students from high school without demonstration of proficiency in basic skills."<sup>170</sup> The court held that these statutes were not "designed to protect against the risk of a particular kind of injury . . . . [In other words, they are] administrative but not protective. Their violation accordingly imposes no liability"<sup>171</sup> in this situation.

The plaintiff's only remaining cause of action was based on misrepresentation, both negligent and intentional, since the school allegedly "represented to plaintiff's mother . . . that plaintiff was performing at or near grade level in [the] basic academic skills."<sup>172</sup> The court held that for the same public policy reasons reviewed above, the plaintiff had not presented a cause of action for negligent misrepresentation.<sup>173</sup> Furthermore, since the plaintiff did not allege "the requisite element of *reliance* upon the 'misrepresentation',"<sup>174</sup> no cause of action for intentional misrepresentation was stated. Therefore, the lower court's dismissal of plaintiff's complaint was affirmed.

A New York case decided in 1978, *Donohue v. Copiague Union Free*

<sup>166</sup> *Id.* at 823, 131 Cal. Rptr. at 859-60 (footnotes omitted).

<sup>167</sup> *Id.* at 825, 131 Cal. Rptr. at 861.

<sup>168</sup> *Id.* at 826, n.5, 131 Cal. Rptr. at 862, n.5. Plaintiff cites CAL. EDUC. CODE and Title 5 of the CALIFORNIA ADMINISTRATIVE CODE. (CAL. EDUC. CODE § 51216 (West, Supp. 1981) provides that when a student "does not demonstrate sufficient progress towards mastery of basic skills," the principal shall arrange a conference with the student's parents. No section more precisely supporting the plaintiff's assertion was found.)

<sup>169</sup> 60 Cal. App.3d at 826, n.5, 131 Cal. Rptr. at 862, n.5. Plaintiff cites "the Constitution and laws of the State of California."

<sup>170</sup> 60 Cal. App.3d at 826, n.5, 131 Cal. Rptr. at 862 n.5. Plaintiff cites CAL. EDUC. CODE § 8573 *et. seq.* (current version at CAL. EDUC. CODE § 51225 (1978)).

<sup>171</sup> 60 Cal. App.3d 814, 826-27 (1976). *See* CAL. GOV'T CODE § 815.6 (West 1980) quoted in 60 Cal. App.3d at 826, n.6, 131 Cal. Rptr. at 862, n.6.

<sup>172</sup> 60 Cal. App.3d at 827, 131 Cal. Rptr. at 862.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 827, 131 Cal. Rptr. at 863 (emphasis in original).



*School District*<sup>175</sup> presented facts, claims, a result, and an opinion remarkably similar to the *Peter W.* case as well as quoting from it extensively; thus it will not be discussed in detail herein. The New York Court did, however, raise several new points relative to educational malpractice claims.

First, the court held that their determination that no duty was owed to the plaintiff

[did] not mean that educators are not ethically and legally responsible for providing a meaningful public education. . . . Quite the contrary, all . . . officials of our schools bear an important public trust and may be held to answer for the failure to faithfully perform their duties. It does mean, however, that they may not be sued for damages by an individual student.<sup>176</sup>

Furthermore, the court advanced the opinion that "[i]t simply is not within the judicial function to evaluate conflicting theories of how best to educate."<sup>177</sup>

Although the court in *Peter W.* did not reach the second and third elements of a cause of action in negligence because it found that the first element, (duty of care) was not shown, in *Donohue* the court stated:

the plaintiff's complaint must be dismissed because of the practical impossibility of demonstrating that a breach of the alleged . . . duties was the proximate cause of his failure to learn. . . . It is not alleged that the plaintiff's classmates, who were exposed to the identical classroom instruction, also failed to learn. From this it may reasonably be inferred that the plaintiff's illiteracy resulted from other causes.<sup>178</sup>

Finally the court made note of the fact that plaintiff did not advance a claim based on misrepresentation<sup>179</sup> so it is reasonable to assume that the next educational malpractice case that is filed will test a cause of action based on intentional misrepresentation and that the plaintiff, unlike *Peter W.*, will remember to allege reliance.

Since the two educational malpractice suits discussed herein were brought in New York,<sup>180</sup> and California,<sup>181</sup> and the pre-eminent due process and equal protection case in the competency testing area was brought in Florida,<sup>182</sup> and these three states are generally considered to be the most

<sup>175</sup> 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978).

<sup>176</sup> *Id.* at 35, 407 N.Y.S.2d at 879.

<sup>177</sup> *Id.* See supra notes 70-74 and accompanying text for one explanation of why the court may get involved when competency tests are at issue.

<sup>178</sup> *Id.* at 39, 407 N.Y.S.2d at 881.

<sup>179</sup> *Id.*

<sup>180</sup> *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978).

<sup>181</sup> *Peter W. v. San Francisco Unified School Dist.*, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

<sup>182</sup> *Debra P. v. Turlington*, 474 F. Supp. 244 (1979).

progressive trendsetters in developing new legal theories and causes of action, these cases may be just a hint (or a threat) of what is to come.

As discussed herein, there are numerous advantages and comparable disadvantages to testing for minimum competency. "Whatever one's personal views, the movement is so strong that few . . . schools in this country are likely to be untouched by its impact."<sup>183</sup>

One caveat may be appropriate. "The word 'minimum' emphasizes that some students will be at a minimum expectation level upon graduation. It does not guarantee that students will be proficient at [the basic skills]."<sup>184</sup> Being at the minimum level, yet "competent" is, of course, better than being illiterate; but no minimum competency testing statute should, in and of itself, be viewed as a miraculous solution to the many problems facing today's schools. If anything, enacting such a statute is likely to create some brand new problems that someone is going to have to solve. Yet if a minimum competency testing program does help students to attain literacy, it will be worth the cost.

DIANNE L. GOSS

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<sup>183</sup> McClung, *supra* note 20, at 653.

<sup>184</sup> Findley, *supra* note 138, at 618.

# Appendix A

## REPRESENTATIVE STATE COMPETENCY TESTING STATUTES\*

STATE	PURPOSE	LOCAL OR STATEWIDE	CRITERION OR NORM REFERENCED	LIFE OR SCHOOL SKILLS	DATES OF IMPLEMENTATION
<b>COLORADO 1971</b> The Educational Accountability Act of 1971 Colo. Rev. Stat. §§ 22-7-101 to 22-7-105	<ul style="list-style-type: none"> <li>—to define and measure quality in education; to help the public schools achieve quality life opportunities</li> <li>—to help "school patrons" to determine the relative value of their school program compared to its cost.</li> </ul>	—separate sections for state and local programs	—N/A (to be developed by the State Board of Education)	—shall include reading, language skills and mathematical skills	—To be established by the State Board of Education and an advisory committee.
<b>FLORIDA 1976</b> The Educational Accountability Act of 1976 Fla. Stat. Ann. §§ 229.55-229.58, 232-246	<ul style="list-style-type: none"> <li>—required for graduation (a certificate of completion will be awarded to those who fail)</li> <li>—results are also to be used to improve the operation and management of the schools and to aid in identifying disruptive or unsuccessful students</li> </ul>	—Statewide		<ul style="list-style-type: none"> <li>—shall include but not be limited to basic reading, writing and mathematics skills</li> <li>—ability to successfully apply basic skills to everyday life situations will also be tested.</li> </ul>	1982-83 - the test may be used as an exit requirement for the first time (Debra PJ Testing will take place in grades 3, 5, 8 & 11 (11th grade assessment may be done after March 15 in the 10th grade).
<b>NEW JERSEY 1975</b> Public School Education Act of 1975 N.J. Rev. Stat. Ann. §§ 18A:7A-1 to 18A:7A-16 (West)	—the goal is to provide all students in the state the proper educational opportunity which will prepare them to function politically, economically and socially in a democratic society.	<ul style="list-style-type: none"> <li>—uniform statewide standards</li> <li>—local districts establish goals and if a local district falls below state standards, it shall establish interim goals designed to assure reasonable progress towards achieving at least the statewide standards.</li> </ul>		—basic communications and computational skills necessary to function . . . in a democratic society.	<ul style="list-style-type: none"> <li>—by September 22, 1980 evaluation of state and local systems and the sufficiency of education provided should begin.</li> <li>—annual testing locally should reflect statewide standards for proficiency at "appropriate points" in the pupils' education.</li> </ul>

<p><b>NORTH CAROLINA</b> N.C. Gen. Stat. §§ 115-320.6 to 115-320.26</p>	<p>—for high school competency testing:          (i) to assure that all high school graduates possess the skills and knowledge necessary to function successfully as a member of society,          (ii) to identify strengths and weaknesses of the educational process,          (iii) to help make the educational system accountable to the public for results.          —for elementary and junior high school testing: to help local systems and teachers identify and correct student needs in basic skills.</p>	<p>—Statewide</p> <p>—criterion referenced tests for first and second graders          —norm referenced tests for grades three, six and nine.          —not specified for eleventh grade tests.</p>	<p>—“basic skills” for elementary and junior high students          —skills necessary to function as citizens for high school students.</p>	<p>—Spring 1978 - pilot testing for high school administered to eleventh graders.          —beginning in the fall of 1978 - annual testing of all eleventh graders. Those who fail are to be given remediation and additional opportunities to take the test up to and including the last month of twelfth grade.          —beginning prior to the end of the 1977-78 school year grades one, two, three, six and nine will be tested annually.</p>
<p><b>WASHINGTON</b> Wash. Rev. Code Ann. §§ 28A.03.360</p>	<p>—to allow the public and the legislature to evaluate how Washington students compare to students tested in other comparable national achievement surveys          —optional local testing of second graders to identify those students in need of assistance.</p>	<p>—Statewide in grades four, eight, and eleven          —local districts are encouraged to test second graders.</p>	<p>—reading, mathematics and language arts.</p>	<p>—beginning in 1975-77          - statistical random samples of eighth and eleventh graders sufficient to generalize about all eighth and eleventh graders.          —tests will also be administered annually to all students in grade four.</p>

\*See also ARK. STAT. ANN. §§ 80.151-80.158 (1980); CAL EDUC. CODE §§ 51215-51219 (West Supp. 1981); LA. REV. STAT. ANN. §§ 17.391.1 to 17.391.10 (West Supp. 1981); MD. EDUC. CODE ANN. §§ 7-202 to 7-205 (1978); MICH. COMP. LAWS ANN. §§ 388.1081 to 388.1083 (1976); NEV. REV. STAT. § 389.015 (1977).

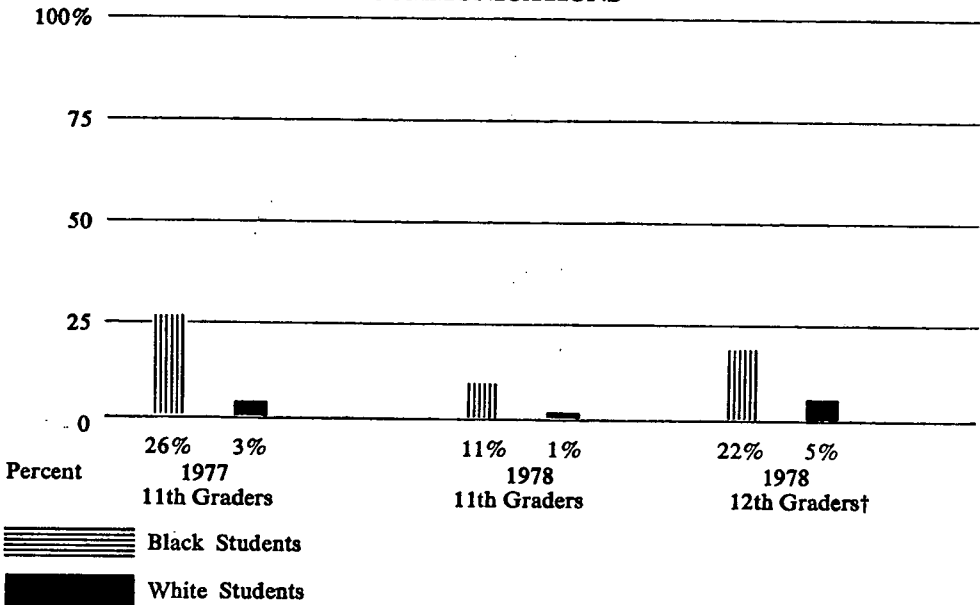
See additional state plans mentioned or discussed in SEPEP REPORT, *supra* note 13 (Alabama at 7; Arkansas at 13; Georgia at 37; Kentucky at 43; Mississippi at 59; Tennessee at 95; Texas at 103; Virginia at 111); Pipho, *Minimum Competency Standards*, TODAY'S EDUCATION, 34, 35 (Feb.-Mar. 1978); *State Activity in Minimum Competency Testing* (as of March 15, 1978). 59 PHI DELTA KAPPAN 587 (May 1978).

See also Enochs, *Modesto, California: A Return to the Four Rs*, 59 PHI DELTA KAPPAN 609 (May 1978); Beal, *Denver, Colorado: A 17-Year-Old Minimum Competency Testing Program*, 59 PHI DELTA KAPPAN 610 (May 1978); Henderson, *Gary, Indiana: High School Diplomas with Meaning*, 59 PHI DELTA KAPPAN 613 (May 1978); Findley, *Westside's Minimum Competency Graduation Requirements: A Program That Works*, 59 PHI DELTA KAPPAN 614 (May 1978).

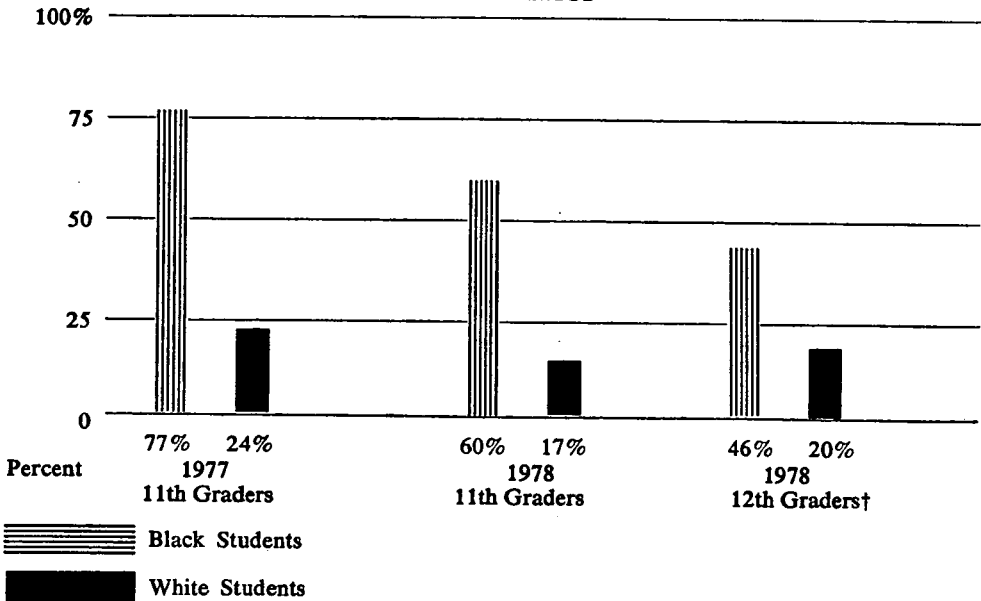
## Appendix B

## FAILURE RATES ON FLORIDA, SSAT II\*

## COMMUNICATIONS



## MATHEMATICS



\*Statistics found in Turlington, Good News from Florida: Our Minimum Competency Program is Working, 60 Phi Delta Kappan, 649, 650 (May 1979). Turlington was the Commissioner of Education for the State of Florida.

†Twelfth graders were either retaking the test after having failed it in 1977, or were new to the school system.